.107

No. 08-246

Supreme Court, U.S.
FILED
SEP 29 2008
OFFICE OF THE CLERK

In the
Supreme Court of the United States

MICHIGAN ENVIRONMENTAL COUNCIL,
Petitioner,

v

MICHIGAN PUBLIC SERVICE COMMISSION AND INDIANA MICHIGAN POWER COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF OF RESPONDENT MICHIGAN PUBLIC SERVICE COMMISSION IN OPPOSITION

Michael A. Cox
Attorney General

B. Eric Restuccia
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Steven D. Hughey
Michael A. Nickerson
Patricia S. Barone
Assistant Attorneys General
Attorneys for Respondent
Michigan Public Service
Commission

QUESTION PRESENTED

Where the Michigan Court of Appeals affirmed a Michigan Public Service Commission Order allowing Indiana Michigan Power Company to collect spent nuclear fuel disposal costs in its rates as provided by State law, and where that Court found that the Michigan Public Service Commission did not rely on federal preemption in rejecting Petitioner's request to disallow these costs, does this Court have jurisdiction to review the State appellate court decision under 28 USC 1257?

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 2
STATEMENT 2
REASONS FOR DENYING THE WRIT 7
CONCLUSION 13

TABLE OF AUTHORITIES

Cases

I&M, et al v DOE,
319 US App DC 209; 88 F3d 1272 (1996) 10, 11

In re Application of Indiana Michigan Power Company, 275 Mich App 369; 738 NW2d 289, lv den, 480 Mich 1032; 743 NW2d 205 (2008), motion for reconsideration denied, 481 Mich 881; 748 NW2d 811 (2008) 7, 8

Michigan Environmental Council v Michigan Public Service Comm, 481 Mich 881; 748 NW2d 811 (2008) 2

Michigan Environmental Council v Michigan Public Service Comm, 275 Mich App 369; 738 NW2d 289 (2007) 1

Michigan Environmental Council v Michigan Public Service Comm, 480 Mich 1032; 743 NW2d 205 (2008) 1

Michigan Public Service Comm U-13919, 2005 Mich PSC LEXIS 128 (2005) 2

Michigan Public Service Comm, U-13919, 2005 Mich PSC LEXIS 256 (2005) 2

Northern States Power Co, et al v DOE, 327 US App DC 20; 128 F3d 754 (1997) 10, 12

Statutes and Rules

28 USC 1257 i

42 USC 10101 *et seq.* 11

MCL 8.4b 4

MCL 460.1 *et seq.* 3

MCL 460.6 4
MCL 460.6a 4
MCL 460.6j *et seq.* 4
MCL 460.6j(1)(a) 5
MCL 460.6j(12)-(16) 5
MCL 460.6j(3) 5
MCL 460.6j(5) 5

No. 08-246

In the
Supreme Court of the United States

MICHIGAN ENVIRONMENTAL COUNCIL,
Petitioner,

v

MICHIGAN PUBLIC SERVICE COMMISSION AND INDIANA MICHIGAN POWER COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF OF RESPONDENT MICHIGAN PUBLIC SERVICE COMMISSION IN OPPOSITION

OPINIONS BELOW

The order of the Michigan Court of Appeals is reported at 275 Mich App 369; 738 NW2d 289 (2007). Pet. App. 1a-16a. The June 7, 2007, order of the Court of Appeals denying Petitioner's motion for correction and reconsideration is not reported. Pet. App. 71a-72a.

The order of the Michigan Supreme Court denying Petitioner's Application for Leave to Appeal is reported at 480 Mich 1032; 743 NW2d 205 (2008). Pet.

App. 69a-70a. The order of the Michigan Supreme Court denying Petitioner's Motion for Reconsideration and Motion for Stay is reported at 481 Mich 881; 748 NW2d 811 (2008). Pet. App. 67a-68a.

The Opinion and Order of the Michigan Public Service Commission (MPSC) in Case No. U-13919 issued on April 28, 2005, can be found at 2005 Mich PSC LEXIS 128 (2005). Pet. App. 25a-43a. The August 1, 2005, MPSC Order denying reopening and rehearing in that case can be found at 2005 Mich PSC LEXIS 256 (2005), Pet. App. 17a-24a. The entire record in the MPSC proceedings can be accessed at: http://efile.mpsc.cis.state.mi.us/efile/viewcase.php?case num=13919.

JURISDICTION

The order of the Michigan Supreme Court denying Petitioner's application for leave to appeal was entered on January 22, 2008. Pet. App. 69a-70a. The order of the Michigan Supreme Court denying Petitioner's motion for reconsideration and motion for stay was denied on May 27, 2008. Pet. App. 67a-68a. The petition for writ of certiorari was filed by Petitioner on August 25, 2008. The jurisdiction of this Court is invoked by Petitioner under 28 USC 1257. Respondent MPSC disputes that this Court has jurisdiction to review the State court order under this statute or any other statute.

STATEMENT

Michigan law provides a comprehensive statutory scheme for the regulation of public utilities

within the State. 1939 PA 3 (Act 3) is a Michigan statute that provides for the regulation and control of public utilities and certain private utilities.[1] Pet. App. 140a-141a. The MPSC has broad and exclusive power to regulate and approve rates for all public utilities in the State of Michigan. MCL 460.6 grants this power as follows:

> (1) The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state except a municipally owned utility, the owner of a renewable resource power production facility as provided in section 6d, and except as otherwise restricted by law. The public service commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities. The public service commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of public utilities, including electric light and power companies, whether private, corporate, or cooperative; water, telegraph, oil, gas, and pipeline companies; motor carriers; private wastewater treatment facilities; and all public transportation and communication agencies other than railroads and railroad companies.
>
> (2) A private, investor-owned wastewater utility may apply to the commission for rate regulation. If an application is filed under this

[1] Michigan Compiled Laws (MCL) 460.1 *et seq.*

> subsection, the commission is vested with the specific grant of jurisdictional authority to regulate the rates, fares, fees, and charges of private, investor-owned wastewater utilities. As used in this subsection, "private, investor-owned wastewater utilities" means a utility that delivers wastewater treatment services through a sewage system and the physical assets of which are wholly owned by an individual or group of individual shareholders.

Section 6a of Act 3 provides for procedures for the MPSC to utilize when approving rates for public utilities and requires that a contested case be conducted whenever an order will result in an increase in the cost of services to a customer.[2] Pet. App. 141a-144a.

A statute amending Act 3,[3] permits an electric utility to recover its power supply costs through either base rates or through a power supply cost recovery (PSCR) clause.[4] Pet. App. 144a-174a.

Act 304 defines a PSCR clause as follows:

> (a) "Power supply cost recovery clause" means a clause in the electric rates or rate schedule of

---

[2] MCL 460.6a.

[3] 1982 PA 304; MCL 460.6j *et seq.* (Act 304).

[4] The portion of Petitioner's Appendix containing MCL 460.6; MCL 460.6a, and MCL 460.6j *et seq.* include the catch line heading of each section of the statutes. Michigan law provides that these headings "shall in no way be deemed to be part of the section or statute, or to be used to construe the section more broadly or narrowly than the text of the section would indicate, but shall be deemed to be inserted for purposes of convenience to persons using publications of the statutes." MCL 8.4b.

> a utility which permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices.[5]

If the MPSC has approved a PSCR clause for an electric utility, that utility collects its power supply costs on a yearly basis. Prior to the beginning of the year, the utility will present its plan to acquire power to serve its customers, typically by its own generation or through power purchase contracts. The plan will indicate the utility's expected sales and propose a per unit cost of electricity that is known as the PSCR factor.[6] A contested administrative proceeding, known as a PSCR plan case, is conducted, and the MPSC then establishes PSCR factors.[7]

After the conclusion of the year, the PSCR costs are reconciled with the actual collection of costs, and a determination is made as to whether the acquisition of power was done in a reasonable and prudent manner. If the utility has overrecovered its costs, it refunds the overcollection. If it underrecovers, it may surcharge its customers.[8]

---

[5] MCL 460.6j(1)(a).

[6] MCL 460.6j(3).

[7] MCL 460.6j(5).

[8] MCL 460.6j(12)-(16).

Within this comprehensive State statutory ratemaking scheme, Indiana Michigan Power Company (I&M) filed for MPSC approval of a PSCR plan and for authorization of monthly PSCR factors for the calendar year 2004 in MPSC Case No. U-13919. The Petitioner[9] intervened in U-13919 and argued that the portion of I&M's PSCR costs, which included spent nuclear fuel (SNF) disposal costs, should be disallowed. The MPSC, however, held that no showing had been made that it was unreasonable or imprudent for I&M to incur those costs, and that those costs could be recovered from ratepayers in the PSCR factors. Pet. App. 37a - 41a.

Petitioner argued on appeal in State court that the Commission order was unlawful because it did not adopt Petitioner's recommended disallowance of these SNF disposal costs. The Michigan Court of Appeals affirmed, holding that the MPSC had properly concluded that I&M had acted reasonably and prudently in including SNF disposal fees in its PSCR factors. The Court noted that I&M's witness testified

---

[9] Petitioner alleges that it is "a statewide environmental and consumer protection organization comprising over 70 public interest organizations representing some 200,000 Michigan utility ratepayers." Pet., 11, footnote 3. MEC's Petition to Intervene in MPSC Case No. U-13919, reveals that it asserted at that time that it was a "statewide nonprofit public interest and environmental organization consisting of 64 public health and environmental organizations, having over 200,000 members," and that "[v]arious of the individual member organizations of MEC, and their citizen members, purchase their electricity in whole or part from Indiana Michigan Power Company." It did not allege that the organization had 200,000 Michigan utility ratepayers or that the organization comprised of over 70 organizations representing those ratepayers. The Petition to Intervene can be accessed at: http://efile.mpsc.cis.state.mi.us/efile/docs/13919/0004.pdf.

that: 1) the payment of these fees was required under I&M's contract for SNF disposal with the Department of Energy (DOE); 2) I&M's decision to pay these fees, notwithstanding the federal government's delay in completing a disposal site, was consistent with action taken by other utilities; 3) if I&M refused to pay the fees it risked losing its license to operate its nuclear power plant; and 4) I&M had supported litigation to compel the federal government to fulfill its duties under the National Waste Policy Act.[10] Pet. App. 12a-13a.

Significantly, the Court observed that while Petitioner had argued that federal law did not preempt the MPSC's ratemaking powers over SNF disposal fees, it "*need not consider this argument because the PSC did not rely on the doctrine of federal preemption.*" Pet. App. 13a. (Emphasis added.) The Court held that the MPSC acted within its authority in declining to adopt the Petitioner's recommended disallowance and other remedies. Pet. App. 13a.

REASONS FOR DENYING THE WRIT

Petitioner seeks a writ for this Court to review a Michigan Court of Appeals' decision affirming a MPSC ratemaking order finding certain utility costs to be incurred reasonably and prudently. The Michigan court correctly held that the MPSC did not base its decision on federal preemption. Petitioner's collateral attack on federal appellate decisions addressing

---

[10] *In re Application of Indiana Michigan Power Company*, 275 Mich App 369, 378; 738 NW2d 289, lv den, 480 Mich 1032; 743 NW2d 205 (2008), motion for reconsideration denied, 481 Mich 881; 748 NW2d 811 (2008).

contracts for spent nuclear fuel disposal does not establish a conflict between the Michigan Court of Appeals' decision and the Constitution or laws of the United States. Petitioner has failed to demonstrate that this Court has jurisdiction to issue a writ of certiorari to review this State ratemaking decision.

I. WHERE THE STATE COURT OF APPEALS CORRECTLY FOUND THAT THE MPSC HAD NOT RELIED ON FEDERAL PREEMPTION IN REACHING ITS DECISION, PETITIONER HAS FAILED TO ESTABLISH A BASIS FOR THIS COURT'S JURISDICTION PURSUANT TO 28 USC 1257.

Petitioner generally claims that the MPSC is not "preempted" from disallowing spent nuclear fuel disposal costs in a State power supply cost recovery proceeding. Petitioner's argument incorrectly assumes that the MPSC found that it was preempted by federal law from disallowing I&M's SNF disposal fees. The MPSC never made such a finding, as the Court of Appeals properly found.[11] Pet. App. 13a. Instead, the MPSC found, based on testimony, that I&M had acted reasonably and prudently in incurring these costs. Pet. App. 73a-97a. No preemption issue exists in this case.

Furthermore, Petitioner's recitation of other Michigan Court of Appeals' decisions affirming similar findings for other utilities is irrelevant to the issue of

---

[11] *In re Application of Indiana Michigan Power Company*, 275 Mich App 378, footnote 5.

whether this Court has jurisdiction under 28 USC 1257.[12]

Petitioner seeks to advance a federal preemption argument regarding the Court of Appeals' decision affirming the MPSC's ratemaking decision. But a review that court's decision plainly establishes that the preemption issue was not considered - either by the Michigan Court or the MPSC - when determining whether I&M's payment of SNF fees was reasonable and prudent and whether such costs were lawfully included in its rates:

> The PSC has the discretion to consider a variety of factors when setting just and reasonable rates,[4] and the authority granted to the PSC is set out in MCL 460.6a and MCL 406.6j. The PSC acted in accordance with this authority and properly concluded that, in the absence of a finding of unreasonable or imprudent conduct on the part of a utility, it lacked the authority to impose the remedies suggested by appellants, including placing the burden of paying SNF fees on IMPCo's stockholders rather than on IMPCo's ratepayers. Appellants have not shown by clear and satisfactory evidence that the PSC's decision is unlawful or unreasonable. MCL 462.26(8).[5]

---

[4] See *Detroit v Public Service Comm.*, 308 Mich. 706, 718; 14 N.W.2d 784 (1944).

---

[12] Rather than showing a need for this Court to resolve conflicting opinions by granting certiorari, these decisions show that the Commission's findings regarding the reasonableness and prudence of payment of these fees has been consistently applied.

> [5] Appellants argue that federal law does not preempt the PSC's ratemaking powers over SNF fees. We need not consider this argument because the PSC did not rely on the doctrine of federal preemption. Moreover, a state utility commission must allow, as a reasonable operating expense, a cost incurred pursuant to a federal statute, see *ABATE v. Pub Service Comm.*, 192 Mich. App. 19, 22-27; 480 N.W.2d 585 (1991) (holding that states must give effect to rates approved by the Federal Energy Regulatory Commission), and SNF fees paid by IMPCo are mandated by statute, 42 U.S.C. 10222(a).
>
> Pet. App. 13a.

Thus, both the MPSC's decision and that of the Michigan Court of Appeals were based upon State law. Because of that no federal question is presented for review.

II. PETITIONER'S COLLATERAL ATTACK ON FEDERAL APPEALS COURT DECISIONS RELATING TO SPENT NUCLEAR FUEL DOES NOT ESTABLISH 28 USC 1257 JURISDICTION TO REVIEW A STATE COURT OPINION INVOLVING STATE RATEMAKING AUTHORITY.

Petitioner has failed to show that the Court of Appeals' decision conflicts with the Constitution or laws of the United States. Petitioner has nonetheless included a significant discussion of two federal decisions, *I&M, et al v DOE*[13] and *Northern States Power Co, et al v DOE*[14] in what amounts to a collateral attack on those decisions. Although in each

[13] *I&M, et al v DOE*, 319 US App DC 209; 88 F3d 1272 (1996).

[14] *Northern States Power Co, et al v DOE*, 327 US App DC 20; 128 F3d 754 (1997).

of these decisions, the U.S. Court of Appeals for the District of Columbia Circuit found that the DOE had a responsibility to accept SNF for disposal as of January 31, 1998, it did not issue a writ of mandamus ordering DOE to dispose of the SNF. Rather, the D.C. Circuit indicated that aggrieved utilities with a standard contract for disposal of SNF with DOE could pursue their contractual remedies.[15]

In *I&M, et al v DOE* (in which Respondent I&M was the lead utility company), the D.C. Circuit issued its decision, prior to the January 31, 1998 date specified in the Nuclear Waste Policy Act (NWPA),[16] Pet. App. 73a-97a., for DOE to start disposing of the SNF. The D.C. Circuit found that the statute created "an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998."[17] In *Northern States Power Co, et al v DOE*, (issued on November 14, 1997 before the January 31, 1998 statutory deadline), the D.C. Circuit noted that, after its decision in the *I&M, et al v DOE* case, DOE informed various utilities and State commissions that it would not accept the SNF for disposal by the 1998 deadline. The D.C. Circuit held that it would not grant a writ of mandamus sought by the Petitioners requiring DOE to comply with the previous holding because the standard contract between DOE and the utilities "provides a potentially

---

[15] It is also noteworthy that while Petitioner here attempts to argue that the MPSC has failed in its alleged duty to disallow the fees paid by I&M to DOE, the Petitioner fails to note that the MPSC was the lead State in the litigation of both of these cases on behalf of a group of numerous State commissions.

[16] Nuclear Waste Policy Act of 1982, as amended, 42 USC 10101 *et seq.*

[17] *I&M, et al v DOE*, 319 US App DC 209; 88 F3d 1272, 1277 (1996).

adequate remedy if DOE fails to fulfill its obligations by the deadline."[18]

Neither of these decisions are relevant to a consideration of whether this Court should grant this Petition because they concern the rights and remedies for parties to the contracts between utility companies and DOE due to DOE's breach of its duty to dispose of SNF. While Petitioners are dissatisfied with these decisions, the fact remains that the D.C. Circuit declined to order DOE to begin disposing of the SNF as a consequence of DOE's breach of its obligation to do so.

These federal decisions do not involve State ratemaking authority, or State decisions regarding reasonable power supply costs for a State utility commission to include in rates. In MPSC Case No. U-13919, the subject of the Michigan Court of Appeals' decision for which the writ is sought, the MPSC approved including the SNF disposal fees that I&M paid to DOE in I&M's PSCR rates. That decision did not involve the contractual rights of either I&M or DOE, or the remedies available for breach of contractual rights between those two entities. The Commission simply found that payment of these fees to DOE was both reasonable and prudent under Michigan's comprehensive statutory scheme regulating public utilities.

---

[18] *Northern States Power Co, et al v DOE*, 327 US App DC 20; 128 F3d 754, 755-756 (1997). The D.C. Circuit did issue a writ of mandamus prohibiting DOE from relying on the unavoidable delays provision of the standard contract. *Northern States Power Co* at 756.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted

Michael A. Cox
Attorney General

B. Eric Restuccia
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
Telephone: (517) 373-1124

Steven D. Hughey
Michael A. Nickerson
Patricia S. Barone
Assistant Attorneys General
Attorneys for Respondent
Michigan Public Service
Commission

Dated: September 26, 2008